

[*Willy v. The Coastal Corp.*](#), 85-CAA-1 (ALJ Nov. 29, 1988)

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U.S. Department of Labor
Office of Administrative Law Judges
Suite 201
55 West Queens Way
Hampton, Virginia 23669
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DATE: November 29, 1988
CASE NO. 85-CAA-1

IN THE MATTER OF

DONALD J. WILLY,
COMPLAINANT,

v.

THE COASTAL CORPORATION AND COASTAL STATES MANAGEMENT
CORPORATION,
RESPONDENTS.

BEFORE: Theodor P. von Brand
Administrative Law Judges

RECOMMENDED DECISION AND ORDER

PRELIMINARY STATEMENT

On October 29, 1984, Donald J. Willy filed a complaint under various environmental statutes¹ alleging that his employer,

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Coastal Corporation and its wholly-owned subsidiary, the Coastal Management Corporation, had violated the employee protection provisions of such statutes by terminating him for protected activity within the scope of these laws. On November 26, 1984, the Area Director for the Employment Standards Administration found the allegations of the complaint sustained. He ordered Mr. Willy's reinstatement and other

forms of relief. On November 29, 1984, Coastal filed its notice of appeal requesting a hearing. This was followed by Complainant's appeal with respect to remedy on November 30, 1984.

The proceeding was then referred to the Office of Administrative Law Judges for a hearing. After extensive pretrial, the undersigned issued a recommended order of dismissal on May 6, 1985, on the basis of the Fifth Circuit's decision in *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984), since this case arose in that Circuit. That decision holds that internal complaints are not within the scope of the employee protection provisions of the environmental statutes. The Court held that only contact with government agencies is protected. On June 4, 1987, the Secretary of Labor issued his decision and order of remand stating that the pretrial record did not preclude proof of government contact within the scope of *Brown & Root*. The Secretary, on the issue of internal complaints, declined to follow *Brown & Root*, even though the case arose in the Fifth Circuit.

Subsequent to the remand, Complainant filed a writ of mandamus under the All Writs Act in the Fifth Circuit to compel production of documents which Respondents assert are protected from discovery by the attorney-client privilege. Mandamus was denied on October 26, 1987. *In re Willy*, 831 F.2d 545 (5th Cir. 1987). After further pretrial, the hearing was held in Houston, Texas on March 7-10, 1988.

The record herein has been sealed because of Respondents' contentions concerning the attorney-client privilege. The order governing *in camera* procedures, however, does not cover either the decision of the Administrative Law Judge or of the Secretary of Labor. The *in camera* order, moreover, does not purport to bind the Secretary of Labor who is free to determine on review whether those provisions should remain in effect. (*See* Order regarding In Camera Procedures dated March 15, 1988, attached hereto as Appendix A).

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After the hearing, Respondents and Complainant moved for the admission of newly discovered evidence pertaining to Donald Willy's employment by the Merichem Company in the period October 1987-May 1988. (Respondents' Motion to Admit Additional Evidence dated July 11, 1988 and Complainant's Answer thereto dated July 21, 1988). Accordingly, Coastal Exhibits 68-75 are hereby received into evidence.

FINDINGS OF FACT
A. Identity of the Parties

1. Donald J. Willy (the Complainant) is a thirty-six-year- old lawyer residing in Houston, Texas. (Tr. 29-31). He considers himself to be a specialist in environmental law, (Tr. 33-34). Mr. Willy chose the field of environmental law because it enabled him to use both his legal education and technical background. (Tr. 35). He was employed by the Coastal Corporation from May 1981 to October 1994, to work on environmental

matters. His primary expertise lies in the water pollution and hazardous waste areas. (Tr. 33, 34, 44, 79). His termination by the Coastal Corporation on October 1, 1984 is the genesis of this proceeding.

2. Coastal Corporation and its subsidiary Coastal States Management, Inc. (Coastal or the Respondents) and their affiliates and subsidiaries conduct a diversified energy business. Respondents' principal address in Nine Greenway Plaza, Houston, Texas 77046. They are engaged in operations such as oil refining, the sale of oil and gasoline, the transportation of hydrocarbons by barge, and natural gas transmission by pipeline. Coastal operates in various states and in Europe. As a result of their business pursuits, Respondents are subject to the environmental laws involved in this proceeding and subject to the jurisdiction of federal and state environmental agencies. (Coastal EX 71, Deposition EX No. 7).

B. Identity of Various of Respondents' Employees

3. Clinton B. Fawcett headed the refining and marketing division within Coastal's legal department in the period 1977 to the spring of 1984. In that capacity, he supervised Coastal's environmental attorneys, including Messrs. Willy, Dunker, and Webb. (Tr. 709-710). Initially, he was Mr. Willy's immediate supervisor. (Tr. 58). Mr. Fawcett is currently on long-term disability. (Tr. 708).

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4. George Brundrett is General Counsel, Senior Vice President, and a Director of Coastal. He supervised Clinton Fawcett. (Tr. 72).

5. William R. Dunker was hired as an environmental attorney by Coastal in September 1977. (Tr. 531-532). In late May or early June 1984, he became the supervisor of Donald Willy and Troy Webb, another environmental attorney in Coastal's legal department. (Tr. 538-539). At present, he is general counsel for the Belcher Oil Company of Miami, Florida, which is a subsidiary of Coastal. (Tr. 531).

6. Troy Webb was another lawyer in Coastal's legal department working on environmental matters at approximately the same level as Complainant, (Tr. 54-55). According to Complainant, Mr. Webb's primary expertise lay in dealing with the Texas Air Quality Board. (Tr. 78). He died approximately a year before the hearing. (Tr. 466).

7. Keith Pardue, currently an attorney in Austin, Texas, was a regulatory analyst and senior regulatory analyst employed by Coastal. He worked with both Donald Willy and Troy Webb. (Tr. 420). As a regulatory analyst, Mr. Pardue provided technical environmental analysis of Coastal facilities. (Tr. 420-421). He worked with the legal department on a daily basis. (Tr. 430).

8. Albin Smith, President of the Belcher Company in Florida, requested an audit by the legal department of Belcher's environmental compliance status. Donald Willy, Troy Webb, and Keith Pardue worked on this project, which culminated in the so-called Belcher Report.

9. Robert Johnston was President of Derby Refining Company, a Coastal Property in Wichita, Kansas. He later switched positions with Bill Mueller of Coastal's Corpus Christi refinery, becoming manager of that refinery. (Tr. 291, 374).

10. Dan Hill was the Division head of Coastal's refining and marketing division and Robert Johnston's superior. (Tr. 632-633).

11. Troy Dalton was an environmental engineer in charge of environmental matters at Belcher's Florida facilities. (Tr. 148, 395, 398).

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12. Martin Hall was the engineer in charge of environmental matters at the Corpus Christi, Texas refinery. (Tr. 184).

C. Coastal's Legal Department

13. The environmental work of the legal department in the relevant time period was divided up as follows: Complainant was responsible for the Derby Refining Company, Belcher Oil Company, Wycon Chemical Company and liaison contact with the Colorado Interstate Company. William Dunker was responsible for Coastal's European and West Coast operations. Troy Webb had the Corpus Christi, Texas refinery, and Coastal's pipeline company. (Tr. 56, 282).

14. Some overlap of responsibilities took place between the attorneys in Coastal's legal departments. Each attorney was expected to back up another when the latter was not available. In order to facilitate such support, Respondents' environmental lawyers generally discussed what was going on at the office. (Tr. 536).

15. The philosophy of the Coastal legal department is to develop a good working relationship with the clients, i.e., Coastal's operating units, and gain their trust and confidence. The prevailing view was that if in-house counsel writes memoranda "in a way that casts dispersions [sic] instead of writing things up factually it can break down a good working relationship." (Dunker Tr. 609). According to Coastal's General Counsel, it is the objective of the legal department to keep the client happy. (Coastal EX 65-29).

D. The Derby Refinery

16. The Derby refinery in Wichita, Kansas was one of the first Coastal facilities for which Complainant worked. (Tr. 255). With respect to Derby, Mr. Willy worked on water and air environmental matters. (Tr. 124-125).

17. Complainant and Troy Webb disagreed on the necessity of a sulfur plant or Klaus unit to limit sulfur emissions at the Derby refinery which would have cost \$2-3 million.² Mr. Willy recommended that such a plant be installed. (Tr. 565, 660; Coastal EX 18 B18). In the view of William Dunker, the interpersonal

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problems between Troy Webb and Complainant began at Derby over the need for the sulfur plant. (Coastal EX 18B-18).

18. William Dunker has no recollection of complaints concerning Mr. Willy's representation of Derby. (Tr. 564).

*E. The "Belcher Blowup"*³

19. Belcher Oil Company,⁴ a Coastal subsidiary headquartered in Miami, Florida, operates oil terminals consisting of oil storage tanks along the East and Gulf Coasts of the United States, supplying oil to boats and ships, as well as gasoline to filling stations. Belcher also runs a barge re-working facility and operates barges transporting hydrocarbons between various terminal facilities. (Tr. 139-140).

20. In early 1984, Albin Smith, who had just become president of Belcher, wanted to know the environmental status of his facilities. (Tr. 141). This involved determining the status of Belcher's permits and identifying major environmental problems. (Tr. 143).

21. In January or February 1984, Clinton Fawcett asked Complainant to conduct an environmental audit at Belcher. (Tr. 139, 142). Mr. Willy responded that, because of other commitments, he would require help. Accordingly, Troy Webb and Keith Pardue, a regulatory analyst, were also assigned to the project. (Tr. 142-143).

22. Complainant's supervisors during the investigation and preparation of the Belcher Report were Clinton Fawcett and George Brundrett. Mr. Fawcett changed jobs in March or April 1984, leaving the legal department at that time. (Tr. 281).

23. Complainant delegated to Messrs. Webb and Pardue the task of visiting Belcher's facilities to evaluate the environmental problems at those locations. (Tr. 144).

24. By letter dated January 27, 1984, Albin Smith welcomed "Don Willy and group" to assist in solving Belcher's problems. In that letter, Mr. Smith acknowledged that certain required permits had expired and that some equipment had been installed without first obtaining the necessary permits from authorities. He expressed

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confidence that, "if we are prudent and we expedite the necessary research required, we will probably be able to prevent any major regulatory catastrophe." (Willy EX 63).

25. Complainant, on January 29, 1984, informed Mr. Smith that Troy Webb would be working on air regulations and permits while Keith Pardue would be working on both air and water problems. Mr. Willy stated he would be doing the water work which was his specialty. (Willy EX 64).

26. Mr. Willy's knowledge of underlying conditions at the various Belcher facilities was based on his own prior observations and the memoranda of Messrs. Webb and Pardue. (Tr. 375, *see also* Tr. 385).

27. Troy Webb sent a summary of his conclusions pertaining to Belcher's environmental status, dated March 2, 1984, to Al Smith, Belcher's President, without Complainant's knowledge. A blind copy was sent to Troy Dalton. Mr. Willy complained to Mr. Fawcett that Troy Webb was stabbing him in the back. Mr. Webb subsequently, apologized to Complainant. (Willy Ex 78; Tr. 493-494). Troy Webb's memorandum made it clear that, in his view, Belcher's environmental problems were less serious than they were in Complainant's opinion. (Tr. 494). William Dunker agreed that it was inappropriate for Troy Webb to send that memo without Complainant's knowledge. (Tr. 605).

28. Messrs. Webb and Willy disagreed concerning the validity of the Belcher report in terms of the recommendations made and conclusions drawn. (Tr. 602-603 Dunker). Mr. Dunker felt the Belcher report was another example of the two guys "cat fighting" at each other. (Tr. 616).

29. Donald Willy prepared a series of memoranda dealing with Belcher's environmental concerns, the so-called "Belcher Report." This document, dated March 22, 1984, entered the record as Willy EX 84. (Tr. 146-148, 150). Willy EX 81 is a preliminary draft of the Belcher Report, dated March 9, 1984, prepared by Complainant. (Tr. 149).

30. Troy Dalton, the Belcher engineer responsible for environmental matters, reviewed the preliminary draft of the Belcher Report prepared by Complainant. (Willy EX 81). In the course of that review, he wrote comments such as "Overkill", "Not Correct", "Not true", "Redundant and overkill sets Company up for

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lawsuit" next to Complainant's recommendations and conclusions. (Tr 395-397; Willy EX 81). On March 14, 1984, Troy Dalton sent a copy of Willy EX 81 with his

annotations, stating to Complainant "Keith [Pardue] and I have reviewed your letter and offer the following comments." (Willy EX 81 p. 2).

31. At the end of March, Clinton Fawcett asked Complainant to make changes in the Belcher Report. Mr. Willy refused to make such changes, asserting that they would alter the substance of the report. Complainant discussed the changes with George Brundette, who, according to Mr. Willy, stated he would get back to Complainant, but did not. (Tr. 150, 157-158). According to Complainant, Mr. Fawcett criticized the report for the following reasons:

Q And do you recall--generally speaking, what was Mr. Fawcett's criticism of the report?

A He felt that the report described environmental conditions which should not be put in writing.

Q Did he ever either state directly, or imply to you by word or by deed or tone of voice, or in any other manner, that communicated the message to you why he felt that way?

A Well, he said he read the report and the areas inside the report constituted admissions that Coastal and Belcher had done things wrong and so that we should remove them; that they were incriminating, and that attorneys for Coastal shouldn't be preparing incriminating reports on the company. (Tr. 151)

32. The interlineations on Willy EX 84 are Mr. Fawcett's. The word on the second page "agree" is Mr. Willy's, the remainder of the comments are Mr. Fawcett's. (Tr. 156). Mr. Fawcett scratched through all the comments with respect to noncompliance with the law and all comments recommending changes to bring the companies into compliance. (Tr. 401).

33. In Complainant's view, had Mr. Fawcett's proposed changes been made, the report would have been false because it would have represented that Respondent was in compliance. (Tr. 161).

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34. In his statement to the Department of Labor investigator, Mr. Fawcett stated that he marked out parts of the report "as being not necessary, and not beneficial to anyone," adding "Mr. Willy made allegations in the report that were not substantiated." He summed up "I think the whole report from Willy was a piece of garbage." (Willy EX 163 pp. 3-4).

35. Mr. Fawcett concluded that the Belcher Report was not the beginning of Mr. Willy's problems with Coastal. As far as Mr. Fawcett was concerned, that problem had been put to bed. (Willy EX 163 p. 5). Shortly after these discussions, Mr. Fawcett transferred from the Legal Department to the Gas Supply Department. After that transfer,

he was no longer responsible for legal affairs. (Tr. 163). At that point, William Dunker became Complainant's supervisor. (Tr. 164).

36. According to George Brundrett:

Q (By Ms. Harris) And what was your recommendation to Mr. Willy with respect to the Belcher Report that you reviewed?

A *I agreed that it needed some revision that Mr. Fawcett made.*

Q Did you agree with each recommendation that Mr. Fawcett made?

A Mr. Fawcett asked him to just shorten it down, to make it change its tone a little bit, to be a little bit less instructive on operating people, complaining why they should do something. It was kind of a -- feeling was that if you want to get them to do it, don't get them on the defensive. Don't push them; lead them a little bit. Just a different type of approach. But we both concurred that it seemed overly voluminous. (Coastal EX 65 p. 32) (*Emphasis supplied*)

37. Keith Pardue assessed the Belcher compliance situation as follows:

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A There was some people who had left Belcher. There were some lapses that occurred, and there was in my opinion some rather technical provisions of permits and permit requirements that weren't being followed up because they didn't have the people to do it and didn't have -- you know, there was a lapse that occurred. But my impression was -- is that there were nothing going on at Belcher that put a whole lot of people in a lot of grease.

Mr. Pardue added that he did know that Mr. Willy felt that way. (Tr. 475).

38. In summary, Mr. Pardue felt that management at Belcher needed to take a harder look at "the rather routine environmental considerations occurring" which needed to be resolved. Mr. Pardue did agree that the situation was serious, in that whenever such lapses occur, it is necessary to eliminate them. (Tr. 478). In Mr. Pardue's opinion, the March 22nd memorandum written by Mr. Willy was generally factually accurate. (Tr. 490-503). He felt Mr. Willy's conclusions had a more serious tone than the situation warranted. (Tr. 491). He conceded, however, that Belcher could have been the subject of an environmental suit on the basis of the applicable facts. (Tr. 491).

39. Troy Webb, according to Keith Pardue, felt that Don Willy was taking too harsh or serious a view of the Belcher situation and that Complainant was trying to make more of the situation than was warranted on the basis of the observations made by himself and Keith Pardue. (Tr. 476).

40. Mr. Pardue described the circumstances surrounding the Belcher Report as a "fiasco" for the following reasons:

You know, two attorneys fighting one another, one taking a position that it is more significant than the other; letters being written without one's permission; letters being thrown away. That is what I mean. (Tr. 516)

41. William Dunker first heard of the Belcher environmental audit after the Report was written. (Tr. 580).

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42. Up to the spring of 1984, Dunker recalls no complaints by Troy Webb of personality conflicts with the Complainant. In fact, up to the point of the preparation of the Belcher Report, Mr. Dunker had not heard of such personality conflicts between the two men. He did feel, however, that there might have been some hard feelings left over from the Derby situation. (Tr. 580-583).

43. George Brundrett requested that Mr. Dunker review the Belcher Report some time in April 1984. A week later, Mr. Dunker told Mr. Brundrett "that the report was inflammatory and drew conclusions I don't like to draw. It is my recollection that Don Willy's part of the Belcher Report was inflammatory but that the parts that were written by Pardue and Webb were not." (CX 158 pp. 7-8; Tr. 583, 584, 586, 589). After his review, Mr. Dunker told Mr. Willy that he disagreed with his presentation in the Belcher Report. (Tr. 166).

44. Mr. Dunker discussed the Belcher Report with Troy Webb, and Mr. Webb told him that "it was no big thing. Webb said to me [Dunker] that the whole thing was overblown by Mr. Willy--that the situation was not nearly as bad as it was made out to be. I think that Don Willy was trying to make himself look good and trying to make the people in Fla. look like idiots. He wanted to make himself look good to the detriment of the Co." (Willy EX 158 p. 8, Dunker statement to Department of Labor investigator). Mr. Dunker qualified this statement, saying Belcher left a problem in his mind as to Mr. Willy's judgment, but that that was no reason to terminate him. (Willy EX 158 p. 12).

45. After the Belcher Report, Mr. Willy's job duties did not change, but Complainant started getting the cold shoulder from Messrs. Dunker, Fawcett, Brundrett, Troy Webb, and Keith Pardue. (Tr. 383-384).

46. Moreover, Clint Fawcett advised William Dunker that Albin Smith, the President of Belcher, no longer wanted Complainant in his territory. (Tr. 622).

F. The Corpus Christi Refinery

47. Respondent's Corpus Christi refinery is owned by a Coastal subsidiary. (Tr. 571).

48. Complainant first became involved with the Corpus Christi

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refinery in late 1983 or early 1984, when he was asked to work on the foreign trade zone. (Tr. 255).

49. Complainant had submitted status reports indicating that he had worked on the Corpus Christi refinery. Mr. Fawcett did not believe that Mr. Willy was doing all that work on the Corpus Christi refinery. Mr. Fawcett, however, did nothing about it; nor did he discuss it with Complainant because he thought it was not significant. (Tr. 747).

50. In early June of 1984, Robert Johnston asked Complainant to call TDWR (Texas Department of Water Resources or Texas Water Commission) concerning a closure bond for Corpus Christi. (Tr. 312-313).

51. On June 4, 1984, Mr. Willy wrote a memorandum to Robert Johnston concerning closure bonds at Corpus Christi. (Willy EX 45, Tr. 640). When this was called to Mr. Dunker's attention, he stated the memorandum was written right after his promotion to supervisor, and that while he had no recollection of "him [Willy] doing anything related to the Corpus Christi area. He [Willy] may well have been," but he [Dunker] did not know about it. (Tr. 640).

52. On June 19, 1984, Complainant called Russell Lewis, a geologist with the Texas Water Commission concerning financial assurance for the Corpus Christi Refinery. (Tr. 749, 754-755). This was the only telephone call that Mr. Lewis had with Mr. Willy. Mr. Lewis denied ever threatening to sue Coastal. (Tr. 756).

53. In his testimony at the hearing, Mr. Willy did not recall having a telephone call with Russell Lewis. Complainant, however, conceded such a call could have taken place, stating that he doubts that he had such a call. (Tr. 183, 308).

54. According to Keith Pardue, he and Troy Webb, on a visit to the Corpus Christi facility in the summer of 1984, were told by Martin Hall, the refinery's engineer responsible for environmental matters, that Don Willy had heard from Russell Lewis of the Texas Water Commission that Coastal was in danger of being sued with respect to the Corpus Christi facility because of financial responsibility concerns. Mr. Pardue was surprised that they had not heard this before since the Corpus Christi refinery was Mr.

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Webb's responsibility. (Tr. 432, 509). According to Mr. Pardue, Troy Webb was upset stating he could not understand why Complainant was down there talking to the Texas Water Commission at a facility Mr. Webb was responsible for and why Mr. Willy had not advised of the possibility of a law suit. (Tr. 432-433).⁵

55. On their return to Houston from Corpus Christi, Messrs. Pardue and Webb discussed the situation with William Dunker, complaining that Mr. Willy had made the phone call to Russell Lewis without Mr. Webb's knowledge and without informing him. In addition, Mr. Dunker was advised that Complainant had been saying negative things about Troy Webb. (Tr. 433-434).

56. On August 23, 1984, in a memorandum to Dan Hill, Robert Johnston, manager of the Corpus Christi facility, requested that Complainant be assigned to handle environmental matters at that facility. (Tr. 181, Willy EX 53). In that memorandum, Mr. Johnston expressed the feeling that Troy Webb was not properly representing the Corpus Christi refinery in environmental matters. (Willy EX 53).

G. Interpersonal Relationships Among Respondents' Employees and Their Reputation in the Workplace

57. According to Clinton Fawcett, Complainant was a good environmental attorney, who could do great work, especially when he wanted to. (Tr. 712, 740-741). Mr. Fawcett felt that Mr. Willy did not get along with his coworkers in the department. He himself found Mr. Willy aggravating on occasion because he simply kept talking and you couldn't cut him off. (Tr. 713-714). Secretaries found Complainant difficult to work for. (Tr. 716). Mr. Fawcett's criticisms of Mr. Willy were for petty matters which might on occasion justify a reprimand but not dismissal. (Tr. 740).

58. Complainant had a reputation in the office for exaggerating and telling tall stories. (Tr. 428-429, 703, 720-721).

Larry A. Wainer, another lawyer in the department, objected to working with Mr. Willy. (Tr. 716-717).

59. In William Dunker's opinion, Complainant was a relatively good environmental attorney (Tr. 541). Until Complainant's termination,

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he had no real problem with him. (Tr. 541).

60. In his status reports, according to Mr. Dunker, Donald Willy would claim more credit than he was entitled to when he was just a small part of the team. (Tr. 554). Mr. Dunker believes there was puffing in Complainant's status reports. (Tr. 574-575). Office talk was that Mr. Willy was trying to get more attention than he deserved. (Tr. 576).

61. In the opinion of William Dunker, Complainant is a master of the half truth and shading things. (Tr. 553). However, he trusted Keith Pardue and Troy Webb. (Tr. 560). He had reservations regarding Bob Johnston, not necessarily reservations related to veracity but working type reservations. (Tr. 560).

62. Mr. Willy felt Mr. Webb was not competent in hazardous waste or water environmental issues. (Tr. 303-304). Complainant told George Brundrett that Troy Webb was lazy, did not perform his work in a timely fashion, missed deadlines, and that Mr. Webb was not as good an environmental lawyer as he thought. (Coastal EX 65 p. 18).

63. Mr. Dunker, on the other hand, felt that Troy Webb was the best environmental attorney in Coastal's legal department. (Tr. 540).

64. Keith Pardue initially liked and admired Mr. Willy but his feelings changed because he felt that Complainant appeared to be on a vendetta against Troy Webb. (Tr. 423). According to Mr. Pardue, Complainant had a tendency to say negative things about Troy Webb. (Tr. 424). He noticed this sometime in 1983. (Tr. 474). In his opinion, Messrs. Willy and Webb had a mutual dislike for each other. (Tr. 427).

65. Troy Webb let it be known that Complainant was subverting his relationship with some of his principal clients. (Tr. 770-771).

H. Complainant's Termination

66. William Dunker had no substantial problems with either Mr. Willy or Mr. Webb prior to the summer of 1984. At that point, he got feedback concerning the friction between Messrs. Willy and Webb. He took it in, hoping things would get better. (Tr. 541-542). According to Mr. Dunker, the situation between Messrs.

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Webb and Willy blew up in September 1984. He believed Mr. Webb's assertion that Mr. Willy was stabbing him in the back. (Tr. 543).⁶ Messrs. Webb and Pardue had complained to Mr. Dunker regarding Mr. Willy's allegedly improper call to Russell Lewis sometime in September, approximately a week before the September, 25, 1984 meeting involving Messrs. Dunker, Willy, Webb, and Pardue. (Tr. 515).

67. At some point in September 1984, Mr. Dunker also became aware of the memorandum from Robert Johnston requesting that environmental matters at the Corpus Christi Refinery be assigned to Donald Willy. (Tr. 545; Coastal EX 5).

68. On or about September 25, 1984, William Dunker met with the members of his staff because he felt that the friction between Donald Willy and Troy Webb was getting out of hand. (Tr. 549). In preparation for the meeting, William Dunker drafted a reassignment memo transferring Complainant to Corpus Christi and a letter of reprimand, because he believed Mr. Willy to be responsible for the in-fighting. (Tr. 546-548, 622; Coastal EX 6-8).⁷

69. Mr. Dunker arranged the meeting ostensibly because he wanted to have "a hearing" before he issued the letter of reprimand. (Tr. 547). As far as he knew, this was the first

time that Complainant had confronted an adverse personnel action as an employee of Coastal. (Tr. 623).

70. Mr. Dunker surreptitiously recorded the meeting using a tape recorder concealed in a brief case. (Tr. 551-552). The other participants to the conference and Martin Hall, who was telephoned during the course of the meeting, were not advised by Mr. Dunker that their statements were being recorded. (Tr. 511).

71. Initially, the conversation between Messrs. Dunker and Willy was directed to the possible reassignment of Mr. Willy to Corpus Christi. (Tr. 634; Coastal EX C18 B-2-3).

72. The conversation then focused on the friction between Messrs. Willy and Webb. Mr. Dunker disputed Mr. Willy's assertion that he had not undercut Mr. Webb. Troy Webb was then called in. (C18 B-5). Shortly after Troy Webb's entry, Mr. Dunker asked Mr. Willy whether he had called TDWR. Complainant denied making such

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a call. (C18 B-5). Upon the denial, Mr. Dunker called Martin Hall asking him whether he had heard that Mr. Willy had called up TDWR and been informed of a law suit. (C18 B-5).

73. Martin Hall stated he had no recollection of telling Messrs. Pardue and Webb that Complainant had called TDWR and that the agency was getting ready to sue. (C18 B-5). He then stated that he had heard that Russell Lewis of TDWR indicated that he felt there should be a lawsuit. Martin Hall, however, maintained he did not remember to whom Russell Lewis had made that statement. (C18 B-6). Martin Hall concluded that he did not know whence the indication of a possible law suit had come. (C18 B-6). Mr. Dunker interjected that probably the question would be followed up with Russell Lewis. (C18 B-6).

74. When pressed for an answer, Martin Hall refused to go into specifics, but did confirm that both Messrs. Willy and Webb had made disparaging comments about each other. (C18 B-8).

75. Mr. Dunker felt that he did not find out what was going on [between Messrs. Willy and Webb] because Martin Hall did not confirm Troy Webb's accusations. This, he testified, was the primary reason why he withheld the letter of reprimand. (Tr. 550-551).

76. According to Mr. Dunker, he intended to withhold Complainant's merit pay increase before the meeting. Martin Hall's failure to confirm the call to Russell Lewis and the fact that Troy Webb was apparently also back stabbing Complainant changed his mind. (Tr. 630).

77. During the discussion of the friction between Messrs. Webb and Willy, the participants to the meeting referred to the Belcher Report. (C18 B-11 *et seq.*). Mr. Dunker's comments on that topic are revealing:

. . . I know a lot of problems generated out of that Belcher affair, and frankly, I think that was handled in a [expletive deleted] poor fashion by everybody here. (C18 B-18)

Okay. I think that entire memo was [expletive deleted] poor legal judgment. But that's my opinion. (C18 B-18)

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That's [expletive deleted]. Clint Fawcett thought it was a poor memo, George Brundrett thought it was a poor memo. (C18 B-18)

[Referring to Complainant's circulation of the Belcher Report] Jesus Christ! Do you know what you did? You put a smoking gun out now to the entire [expletive deleted] corporation if you circulated it. (C18 B-19)

We only have one attorney in this department [Willy] that a Senior vice President [Albin Smith of Belcher] won't let him set foot on his territory. (C18 B-20)

[In response to Mr. Willy's question "What do you mean where I work causes personnel problems?"] The Belcher blow up. (C18 B-22)

78. After the meeting by memorandum dated September 25, 1984, Mr. Dunker, with certain exceptions, assigned Mr. Willy responsibility for environmental matters at the Corpus Christi refinery. (Willy EX 57).

79. Within a few days of the September 25, 1984 meeting, Messrs. Webb and Dunker separately called Russell Lewis to inquire whether he had had a telephone conversation with Mr. Willy. (Tr. 553-554, 758).⁸ Mr. Lewis informed Mr. Dunker that he remembered talking to Mr. Willy. William Dunker, describing his reaction as motivated by anger concerning what he considered to be Mr. Willy's lie in denying the call, decided at that point to terminate Complainant. (Tr- 555-556).

80. on October 1, 1984, Mr. Dunker had a second meeting with Mr. Willy. He telephoned Russell Lewis, who again stated in response

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to Messrs. Dunker and Willy's questions that he had had a telephone call with Mr. Willy in June concerning financial assurance. Mr. Dunker terminated Complainant for having denied making the phone call in question. (C18 B-27-18B-30; Tr. 557). This meeting had also been surreptitiously taped by Mr. Dunker. (Tr. 667). The record further shows that Russell Lewis had not been informed that the telephone conversation with him was being recorded. (Tr. 759).

81. Mr. Dunker cannot say whether Complainant would have been fired, if Mr. Willy had told him that he'd talked to Russell Lewis, because it was an important phone call. (Tr. 687).

I. Evidence on Damages

82. Barry Wilbratte is a Professor of Economics and Chairman of the Department of Economics at the University of St. Thomas, Houston, Texas. (Tr 328, Coastal EX 71 p. 7). He was retained by Complainant as an expert with respect to the damages arising out of his termination by Coastal. Professor Wilbratte, who has a Ph.D. in Economics, has published in the area of labor economics and on the topic of calculating damages in the case of loss or incapacity. (Tr. 329).

83. It is Dr. Wilbratte's conclusion that Mr. Willy's lost earning capacity in the form of salary and fringe benefits amounts to \$2,439,954. (Tr. 332). He derived that figure by calculating Complainant's unimpaired or normal earning capacity and subtracting therefrom his current earning capacity. (Coastal EX 71 p. 64).

84. Dr. Wilbratte's calculations of the salary and fringe benefits Complainant would have earned absent termination, i.e., his unimpaired earning capacity, were based on the assumption that Mr. Willy would have remained with Coastal or moved to a better job. (Tr. 342-343).

85. Dr. Wilbratte stated he could only speculate as to Mr. Willy's future earnings. Specifically, he testified:

Q Okay. I take it that if Mr. Willy were in the future employed by a corporation, he might conceivably have some benefits under some similar plans such as he enjoyed at Coastal. But do you have any way to factor that into your calculations? Would you be able, for example, to speculate as to what might happen to Mr. Willy in the future and be able to include that in --

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A Given his present circumstances?

Q Yes.

A I could speculate but I would be doing just that, speculating. (Tr. 345)

86. Complainant's statements to Dr. Wilbratte played a significant role in his calculations. (Tr. 347). Dr. Wilbratte conceded that, if the information provided were inaccurate, his calculations would be affected thereby. (Tr. 347).

87. In this connection, Complainant advised his economic expert that he was unable to find alternative employment within his field of specialization. (Tr. 350). Dr. Wilbratte assumed that Complainant, on the basis of his reputation, would have difficulty returning to the environmental field. (Tr. 355).

88. Dr. Wilbratte was informed by Complainant that he was unable to find a job approaching the salary or benefits he was receiving at Coastal:

Q And the fact is that from that date until the present time, Donald Willy has not been able to find a job that pays anything approaching the salary or benefits that he was receiving as a Coastal employee. Isn't that true?

A Well, those are the facts that were given to me and it is consistent with what I saw on his tax returns. (Tr. 361)

89. On the basis of the information given him, Dr. Wilbratte was unable to project whether Claimant might someday return to a normal track: (Tr. 361)

Q Okay. When you and I discussed this case and we discussed for a fairly substantial period of time the problems we were confronting and the difficulties we were confronting, the [sic] discussed, did we not, a particular problem that we had with respect to calculating Mr. Willy's future earnings impairment, did we not?

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A That is correct.

Q And what -- if you will tell the administrative law judge, please, what exactly was the difficulty that you and I both acknowledged to each other we had in trying to determine exactly what fair sum of money would compensate Mr. Willy for diminished earnings and fringe benefits in the future.

A Well, *the difficulty would be to project whether he might some day return to a normal track. Would he, at some point five, ten, 20 years from now, get on track again as an environmental attorney?* First, how long would it be? Second, if he did that, would his earnings approach the same level he would normally be on or would he always be five, ten, 15 years behind?

The problem is figuring when he would get back on track, how long it would take, how fast his earnings would grow, would he ever reach his former potential, those sorts of things. (Tr. 361-362) (*Emphasis supplied*)

90. Essentially, Dr. Wilbratte's calculations are based on the assumption that Mr. Willy cannot function as an environmental attorney in the future. (Tr. 363).

Q And essentially this is -- you have calculated these numbers as you would a wrongful death action, when Mr. Willy cannot function as an environmental attorney in the future. Is that essentially what these calculations are?

A That is correct. (Tr. 363)

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91. In short, Dr. Wilbratte assumed that Complainant would remain in his present situation for the rest of his life. (Tr. 365). He also testified:

Q What other assumptions, what basic assumptions did you make in arriving at your calculations that are not included in these documents? You mentioned earlier that Mr. Willy had told you that the Coastal Corporation had interfered with his ability to get comparable work; is that correct?

A That's correct.

Q You used that, as I understand it, as a basic assumption that he would not be able to obtain at any point in the future comparable work; is that correct?

A That is correct.

Q What other of those types of assumptions did you use?

A *I assumed that the work he is doing right now is work in which he is not trained. He is making a minimal salary by the standard of attorneys. He doesn't have potential for advancement. (Wilbratte Deposition, Coastal EX 71 p. 57) (Emphasis supplied)*

92. Dr. Wilbratte further assumed that Complainant, as of January 7, 1988, had no fringe benefits. (Coastal EX 71 p. 59).

J. Complainant's Employment History After Leaving Coastal

93. At the time of his termination, Complainant was receiving a salary of \$57,000-\$58,000 a year from Coastal. (Tr. 137, 203).

94. Complainant started looking for another job almost immediately after his termination by Respondents. His efforts did not meet with success. (Tr. 199-200).

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95. In November 1985, Mr. Willy went to work for the State of Texas in the Tax Department, i.e., the Comptroller of Accounts, Austin, Texas, as a hearing examiner level three. (Tr. 202, 380). His annual salary was approximately \$28,000 per year. (Tr. 203). Complainant considered this job temporary until he could find a job at a corporation. (Tr. 205). He stopped working for the State Comptroller of Public Accounts in September of 1987. (Tr. 204). Complainant gave as his reason for quitting his employment the fact that he was renting a house in Houston and also had to rent living quarters in Austin. (Tr. 204).

96. Complainant described his work after leaving the Comptroller's office as follows:

Q All right. What sort of work did you start to do now to support yourself beginning in the fall of 1987?

A Well, previous to that time, I had had a number of contacts with investment banks and other financial institutions and I simply started practicing law doing investment banking, doing legal work for the investment banks that I knew. I also had done some patent work for some companies, generally, in the private practice of law. (Tr. 205)

97. At the time of hearing, Claimant testified that his entire income derived from practicing law and interest income. (Tr. 388).

98. Complainant at the hearing estimated his income for 1987 and 1988 as follows:

Q What approximately was your income in 1987?

A *My income for 1987 would have been between \$30,00 and \$35,000. My income in 1988 is going to be in that same range.* But of course, that would be real speculative because I might be able to find somebody that pays me on an hourly basis instead of a contingent basis and sort of thing.

But basically I don't have any reason to believe that my income is going to be any higher than that. And of course, what we are talking about is gross income, when I subtract my rent and that sort of thing. (Tr. 206) (*Emphasis supplied*)

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99. Mr. Willy, when asked in his deposition where he was currently employed, testified as follows:

Q Where are you currently employed?

A Currently I'm employed doing a variety of different things for different people here in town. I've left the employment with the State of Texas. *I'm not employed in a job as such. I have some temporary positions* and also do some legal work for people as their attorney. (Willy Dep. January 1988 p. 98; Coastal Ex 70) (*Emphasis supplied*)

He testified further in this connection:

Q All right. In the three years and four months that have elapsed since the termination of your employment by Coastal, have you ever managed to find a position that pays more, either in salary or benefits, than you had at Coastal?

A No. (Tr. 411)

100. Complainant had in fact obtained employment as an attorney on the legal staff of a corporation subsequent to his termination by coastal in October 1984 and prior to the hearing in this proceeding in the period March 7-10, 1988, at a salary exceeding that paid by Coastal at the time of his termination. (Findings 93, 102).

101. The Merichem Company is a medium-sized manufacturer of chemicals with corporate headquarters in Houston, Texas. (Coastal EX 74; Deposition of Kirby L. Boston; Deposition EX 2-3). On May 31, 1987 and on June 3, 1987, Merichem advertised for an attorney to assist its General Counsel. *Id.*

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102. Complainant responded to Merichem's advertisements. (Coastal EX 74 p. 10-11). After two to three interviews, Mr. Willy was hired at \$65,000 per year. (Coastal EX 74 pp. 22-24). His first day on the job was October 19, 1987. (Coastal EX 74 p. 36). Merichem hired Complainant as a fulltime employee. (Coastal EX 74 p. 39).

103. Merichem's legal department is involved in licensing, in environmental matters, and in general corporate work. (Coastal EX 74 p. 15). During the time that Complainant was with Merichem, he worked almost exclusively in process licensing. (Coastal EX 74 pp 15-16). Merichem's General Counsel felt that this was the best way to introduce Complainant to the Company. (Coastal EX 74 pp. 16-17). Licensing work involves contract law, and any graduate lawyer, in the view of Merichem's General Counsel, should be able to handle contract matters. (Coastal EX 74 pp. 17-18). Merichem is very concerned with environmental matters and was looking for someone with environmental experience. (Coastal EX 74 pp. 18-19).

104. Although Complainant did no environmental work for Merichem, such work would have been assigned to him had he stayed longer, and Mr. Willy was advised that he would be getting some assignments in that area. (Coastal EX 74 pp. 45, 46).

105. At Merichem, all new employees are considered probationary for a year. (Coastal EX 74 p. 49). In March of 1988, Merichem's General Counsel warned Complainant that he was concerned that Mr. Willy was not suited for the job because of the time he spent on outside activities and because of insufficient attention to his work. Complainant was advised that sometime during the first year a determination would have to be made whether he was the right person for the job. (Coastal EX 74 pp. 51-52). In the opinion of Merichem's General Counsel, Complainant had the ability to do the job but was simply not performing. (Coastal EX 74 pp. 52, 60). Merichem terminated Complainant's employment on or about May 26 1988. (Coastal EX 74 pp. 52-53; Deposition EX 22).

DISCUSSION

Donald J. Willy was an environmental lawyer on the Coastal Corporation and Coastal States Management Corporation's staff in the period 1981-1984. He alleges that his October 1, 1984 termination by Respondents violated the employee protection provisions of various environmental statutes. *See* Footnote 1, *supra*.

Respondents contend that Complainant did not engage in protected activity and that, even if he had engaged in such activity, he would have been fired in any event for lying to his supervisor. In addition, Respondents assert that Complainant lied about his work status during that portion of the proceeding pertaining to damages and that the withholding of this information, crucial to the question of remedy, subverted the litigation as far as that issue was concerned. Respondents, accordingly, urge that Complainant has forfeited his right to any relief.

The Issue of Protected Activity

Insofar as is relevant here, Complainant, while Respondents' employee, worked on environmental matters for the Derby Refinery, Wichita, Kansas, the Belcher Oil Company headquartered in Florida, and the Corpus Christi Refinery in Corpus Christi, Texas. (Findings 16, 21, 48).

The Derby Refinery

While there was disagreement concerning certain measures needed to abate or forestall environmental violations between Donald Willy and his colleague Troy Webb, there is no indication in this record that Complainant was doing anything other than the normal work he was expected to do as an attorney on Coastal's legal staff as far as this facility was concerned. There is no indication in the record that his work at Derby, or recommendations with respect to Derby, played a role in his termination. (Findings 16-18).

Corpus Christi

Complainant alleges that the call to Russell Lewis of the Texas Department of Water Resources (TDWR), which figured in his dismissal, constituted external protected activity within the scope of the environmental laws in issue. This contention is without merit. At various times throughout these proceedings, Complainant denied making the call in question or failed to recall that such a conversation had taken place, (Findings 52-53). Accordingly, there is insufficient information in the record concerning the substance of such contact to support a finding that it constituted protective activity.

The Belcher Report

Of necessity, Complainant relies primarily on events surrounding the preparation of the Belcher Report to substantiate his claim. Complainant wrote a summary memorandum concerning the results of an environmental audit of the Belcher Oil Company, in which he concluded that Belcher was involved in various violations of certain environmental statutes. The record further shows that his supervisor on the legal staff asked him to rewrite the memorandum to tone it down, in order not to offend the operating subsidiary for whom the legal work had been done. In Complainant's

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view, he was asked to change the substance of the report. There was also a sharp difference of opinion between Complainant and other employees of Respondent concerning the seriousness of Belcher's environmental violations. (Findings 21, 27-34, 38-39).

Mr. Willy's writing of the report concerning measures needed to comply with the environmental statutes in question and his refusal to change or water down these conclusions in response to his superior's request are protected activity under the environmental statutes at issue, since his activity in this connection might have led to governmental action designed to enforce the statutory goals. This is made evident by complaints that the report "set the Company up for lawsuit" and that it was a "smoking gun." (Findings 30, 77).

Respondents urge further, however, that Complainant's activity with respect to the Belcher Report cannot be considered protected activity because it involved only internal contacts within Respondents' organization. Relying on *Brown & Root, Inc. v. Donovan*, 747 F.2d 1049 (5th Cir. 1984), Respondents contend that decision of the Fifth Circuit is binding here. In that case, the Court construing statutory language substantially identical to the employee protection provisions relevant here, held that protected activity is limited to contact with governmental agencies. The short answer to Respondents' contention is that on January 4, 1987, the Secretary of Labor explicitly declined to follow *Brown & Root*, even though the instant case arises in the Fifth Circuit. (*Donald J. Willy v. The Coastal Corporation, et al.*, Decision and Order of Remand dated June 4, 1987), The undersigned is bound by the Secretary's holding. Accordingly, Complainant's role in writing the Belcher Report and his refusal to change his conclusions constitute protected activity within the meaning of the statutes in question for the purposes of this proceeding.

*The Issue of Retaliatory Intent*⁹

Prior to the Belcher controversy, Donald Willy had some friction with his co-workers and his superior Clinton Fawcett. (See generally Findings 57-65). Nevertheless, it appears these matters were essentially of a minor nature and did not get out of hand before March of 1984 and the preparation of the Belcher Report. (Findings 17, 42, 57).

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The record shows that Complainant's memorandum on the Belcher environmental audit led to a serious difference of opinion between him and Troy Webb and Keith Pardue, two Coastal employees who worked with him on that project. They differed sharply on the seriousness of Belcher's environmental violations, as well as the potential for governmental enforcement activity with respect thereto. The memorandum also led to friction between Complainant and the client operating subsidiary, the Belcher Oil Company. In this connection, Belcher's environmental engineer wrote on Mr. Willy's preliminary draft of the report such comments as "overkill", "not correct", "not true", "redundant and overkill sets company up for lawsuit" next to Complainant's recommendations and conclusions. According to Troy Dalton's memoranda of transmittal, these views were also shared by Keith Pardue, who was in agreement with Troy Webb on this side of the dispute. (Findings 27-30, 37-40, 46).

In additions Complainant's supervisors in the legal department universally condemned the report, Clinton Fawcett described it as a "piece of garbage." Mr. Dunker stated it was "[expletive deleted] poor judgment," and George Brundrett, Respondents' General Counsel stated that he agreed with Mr. Fawcett that the report should have been rewritten or toned down. (Findings 31- 34, 36). The animus over the Belcher Report continued up to the point of Donald Willy's termination by Respondent in October 1984.

At the meeting on September 25, 1984, surreptitiously taped by Complainant's supervisor, William Dunker, the hostility against Donald Willy arising out of his role in the Belcher Report was unmistakable. (Finding 68). Mr. Dunker's comments concerning the Belcher Report during the course of that conference were the following:

. . . I know a lot of problems generated out of that Belcher affair, and frankly, I think that was handled in a [expletive deleted] poor fashion by everybody here. (C18 B-18)

Okay. I think that entire memo was [expletive deleted] poor legal judgment. But that's my opinion. (C18 B-18)

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That's [expletive deleted]. Clint Fawcett thought it was a poor memo, George Brundrett thought it was a poor memo. (C18 B-18)

[Referring to Complainant's circulation of the Belcher Report] Jesus Christ! Do you know what you did? You put a smoking gun out now to the entire [expletive deleted] corporation if you circulated it. (C18 B-19)

We only have one attorney in this department [Willy] that a Senior Vice President [Albin Smith of Belcher] won't let him set foot on his territory. (C18 B-20)

[In response to Mr. Willy's question "What do you mean where I work causes personnel problems?"] The Belcher blow up. (C18 B-22)

Moreover, the record also compels the finding that the hostility between Complainant and Troy Webb arising out of the Belcher Report was a crucial factor in Complainant's termination. The ill feeling between Complainant and Troy Webb, stemming from the Belcher affair, spilled over to environmental work concerning the Corpus Christi refinery which Mr. Webb viewed as his client. Mr. Webb felt Complainant was subverting that relationship. (Findings 54, 55). Keith Pardue and Troy Webb's complaints to William Dunker concerning Complainant's call to Russell Lewis of the Texas Water Commission, pertaining to the Corpus Christi Refinery, led directly to the September 25, 1984 meeting. Further, the record compels the conclusion that Mr. Dunker, although he characterized the meeting as a hearing, had in effect already made up his mind to discipline Complainant before that meeting on the basis of Messrs. Webb and Pardue's complaints. (Findings 66, 68-69). The inference is inescapable that the purpose of the meeting was simply to justify the adverse personnel action against Complainant already contemplated. Such action was temporarily withheld when Martin Hall failed to furnish the expected justification by corroborating Messrs. Webb and Pardue's complaints concerning Mr. Willy's telephone call to Russell Lewis. (Findings 73-76).

The record shows that, during the course of the September 25, 1984 meeting, Complainant did falsely deny that he had called Russell Lewis of the Texas Water Commission. (Finding 80). Nevertheless, it appears that William Dunker pursued the question of Complainant's phone call in the September 25 meeting and thereafter because of the complaints of Troy Webb and Keith Pardue rooted in their hostility to Complainant arising out of the Belcher audit and because of Mr. Dunker's own animus arising from the Belcher Report. Had it not been for the hostility generated by the Belcher Report, it is unlikely that Mr. Dunker would have pursued the matter of the phone call with such intensity, if at all. In this connection, it is significant that William Dunker stated that he did not know whether he would have fired Complainant had he not lied about the phone call because it was an important phone call. (Finding 81). In short, the reasons for William Dunker's animus against Donald Willy arising out of the Belcher Report and Complainant's subsequent lie about the phone call are inextricably mixed. Under the circumstances, no finding can be made that Donald Willy would have been fired solely for lying about the phone call had he not engaged in protected activity. *See e.g. Wright Line, a Division of Wright Line, Inc.*, 1980 CCH NLRB #17,356 (1980), *affirmed sub. nom. NLRB v. Wright Line*, 662 F.2d 889 (1st Cir. 1981), *cert. den.* 455 U.S. 989 (1982). The record compels the inference that by late September 1984 Mr. Dunker had determined to fire Mr. Willy under any circumstances whether he lied about the phone call or not.

The Issue of Remedy

Complainant seeks in excess of \$2 million in damages for his termination based on the calculations of his expert, Barry Wilbratte. Dr. Wilbratte's conclusions are based to a large degree on information given him by Mr. Willy. The record shows that, if the information provided to Dr. Wilbratte was inaccurate, then his calculations would, of necessity, also be inaccurate. One of Dr. Wilbratte's key assumptions was that there was no way of determining whether Complainant might some day return to a normal track in his field of specialization in environmental law. His calculations, accordingly, are based on the assumption that Mr. Willy cannot function as an environmental attorney in the future. (Findings 83, 86, 89-90).

Dr. Wilbratte's assumption was erroneous. Donald Willy

had failed to inform his expert that he had a fulltime job as an attorney with Merichem Corporation, a chemical company, at a salary of \$65,000 a year. That salary exceeded his pay at Coastal at the time he was terminated by Respondent. Complainant held this position from October 19, 1987 to May 26, 1988, when Merichem terminated him for paying insufficient attention to his duties. Moreover, although Complainant did no

environmental work for Merichem, such work would have been assigned to him had he stayed longer with that firm, and he had been advised that he would be getting such assignments. (Findings 93, 100, 102, 104). In short, Complainant withheld information from his expert, as well as evidence crucial to the outcome of this hearing, that he had in fact every prospect of getting back on track in the environmental field had his performance with Merichem been up to par.

In a deposition prior to the hearing and at the hearing in March of 1988, Complainant gave untruthful or misleading testimony concerning his job status. For example, he testified as follows at a time when he was employed fulltime at a salary of \$65,000 per year by Merichem:

Q What approximately was your income in 1987?

A *My income for 1987 would have been between \$30,000 and \$35,000. My income in 1988 is going to be in that same range.* But of course, that would be real speculative because I might be able to find somebody that pays me on an hourly basis instead of a contingent basis and sort of thing.

But basically I don't have any reason to believe that my income is going to be any higher than that. And of course, what we are talking about is gross income, when I subtract my rent and that sort of thing. (Tr. 206) (*Emphasis supplied*)¹⁰

Mr. Willy, in his deposition, in January 1988 falsely denied that he was currently employed "in a job as such" when he testified as follows:

Q Where are you currently employed?

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A Currently I'm employed doing a variety of different things for different people here in town. I've left the employment with the State of Texas. *I'm not employed in a job as such. I have some temporary positions* and also do some legal work for people as their attorney. (Willy Dep. January 1988 p. 98; Coastal Ex 70) (*Emphasis supplied*)

Fulltime employment at the rate of \$65,000 a year must be considered "a job as such."

He testified further on this topic at the hearing:

Q All right. In the three years and four months that have elapsed since the termination of your employment by Coastal, have you ever managed to find a position that pays more, either in salary or benefits, than you had at Coastal?

A No. (Tr. 411)¹¹

At the time of his deposition and at the time of the hearing, Complainant was employed as a fulltime lawyer at a salary higher than he had received at Coastal. His failure to disclose that crucial fact during the discovery deposition and at trial was inherently deceptive and calculated to affect the outcome of the case. Accordingly, had

Respondents not discovered Claimant's employment with Merichem through a newspaper announcement, that portion of the proceeding devoted to remedy would have been completely subverted.

Where a party has knowingly presented misleading evidence, forfeiture of that party's remedy is required to further the policy of the Act under which relief is sought. *See Iowa Beef Packers, Inc. v. NLRB*, 331 F.2d 176, 185 (8th Cir. 1964). Relief under such circumstances is to be withheld, not for the protection of the other party, but rather to safeguard the integrity of the adjudicative process. *Mas v. Coca Cola Co.*, 163 F.2d 505 (4th Cir. 1947). In this instance, as a result of his attempted

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subversion of this proceeding, Complainant has forfeited his right to damages arising out of his protected activity and Respondents' subsequent, related dismissal of him. Complainant is entitled to no relief.

Recommended Order

IT IS ORDERED that the complaint of Donald J. Willy be, and hereby is, dismissed.

THEODOR P. VON BRAND
Administrative Law Judge

TPvB/jbm

[ENDNOTES]

¹ Mr. Willy filed his complaint pursuant to the Clean Air Act, 42 U.S.C.A. § 7622 (1983); the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. § 9610 (1983); the Water Pollution Control Act, 33 U.S.C.A. § 1367 (1978); the Safe Drinking Water Act, 42 U.S.C.A. § 300j-9(i) (1982); the Solid Waste Disposal Act, 42 U.S.C.A. § 6971, as amended (1983); the Toxic Substances Control Act, 15 U.S.C.A. § 2622 (1983); and 29 C.F.R. Part 24.1 *et seq.*

² Complainant's estimate was \$20 million. (Tr. 565).

³ See Finding 77.

⁴ According to Complainant, the Belcher operations were divided between Belcher "South" with headquarters in Florida and Belcher "North" with headquarters in New York. (Tr. 295).

⁵ Other than what Martin Hall told him, Mr. Pardue has no other independent knowledge of what transpired during the phone call between Donald Willy and Russell Lewis in June of 1984. (Tr. 526).

⁶ Mr. Dunker does not remember conversation between Messrs. Hall and Willy being called to his attention. (Tr. 543).

⁷ The letter of reprimand was based on Troy Webb's complaint, as backed up by Keith Pardue. (Tr. 624).

⁸ Specifically, Mr. Dunker called Mr. Lewis on September 26, 1984 and again on October 1, 1984. (Tr. 759).

⁹ On the retaliation issue, Complainant's allegations are corroborated by contemporaneous documents such as the transcript of the September 24, 1984 meeting, the statements of Coastal's employees to the Department of Labor investigator and Troy Dalton's notations on the preliminary draft of the Belcher report.

¹⁰ This estimate of income for 1988, given at a time when he was employed at \$65,000 a year, is misleading. Complainant's answer also implies contrary to fact that at the time he was confined to contingent fees when he was receiving an annual salary of \$65,000.

¹¹ This answer is not rehabilitated by Complainant's estimate in his affidavit of May 19, 1988 that had he stayed with Coastal his salary at that time would have been in excess of \$85,000. (Willy Affidavit May 19, 1988 Coastal EX 72). Nor can Complainant's withholding of information concerning his Merichem employment be justified on the ground that he had been warned in February and March 1988 that his performance was unsatisfactory and that he therefore would lose this position. *Id.* The fact that he had fulltime employment, which he would have kept had his performance been satisfactory, goes to the heart of the issue of damages.